

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VISUAL SOFTWARE SOLUTIONS, INC.;	:	CIVIL ACTION
MICHAEL L. BRACHMAN; AND	:	
JUDI A. BRACHMAN	:	
	:	
v.	:	
	:	
MANAGED HEALTH CARE ASSOCIATES, INC.;	:	
LAWRENCE S. IRENE; AND	:	
ROBERT IRENE	:	No. 00-1401

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 1, 2000

Defendants Managed Health Care Associates, Inc. ("MHC"), Lawrence S. Irene ("L. Irene"), and Robert Irene ("R. Irene") filed a Motion to Dismiss and to Transfer on April 27, 2000. Following a Rule 16 conference on June 14, 2000, defendants' motion to dismiss was denied and defendants' motion to transfer the action to the United States District Court for the District of New Jersey was taken under advisement. The motion to transfer is now denied.

**BACKGROUND**

Michael and Judi Brachman ("M. and J. Brachman"), Pennsylvania citizens, sold Visual Software Solutions, Inc. ("Visual"), a Pennsylvania corporation, to defendant MHC, a New Jersey corporation, whose principals are defendants L. and R. Irene, New Jersey citizens. There were five agreements relating to the sale of Visual to MHC: 1) an asset purchase agreement; 2) a promissory note; 3) a warrant agreement; 4) an employment

agreement between MHC and M. Brachman; and 5) an employment agreement between MHC and J. Brachman.

Plaintiffs claim that the defendants breached the agreements by failing to make required payments under the promissory note, warrant, and asset purchase agreement. Plaintiff M. Brachman claims that the defendants breached the employment agreement by failing to make required payments after his resignation. Plaintiff J. Brachman also claims a violation of the Pennsylvania Wage Payment and Collection Act arising out of the time she was absent from work because of physical disability.

#### **DISCUSSION**

Both 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406 govern changes in venue. Transfer is proper under § 1404(a) if venue is proper in both the original and requested venue; if the original venue is improper, § 1406 applies. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995). Venue is proper in the Eastern District of Pennsylvania because a substantial part of the actions or omissions that gave rise to the action occurred in the district. See 28 U.S.C. § 1391(a). All defendants are citizens of New Jersey, and venue would be proper in the District of New Jersey. See id. The motion to transfer will be decided under § 1404(a).

Transfer to another proper venue is appropriate under § 1404(a) “[f]or the convenience of parties and witnesses, in the

interest of justice." 28 U.S.C. § 1404(a). The moving party bears the burden of establishing the need for transfer. See Jumara, 55 F.3d at 879 (citing Shutte v. Armco Steel Corp., 431 F.2d 22 (3d Cir. 1970), cert. denied, 401 U.S. 910 (1971)). The factors to be considered in deciding a motion to transfer include: 1) plaintiff's original choice of forum; 2) the existence of a forum selection clause; 3) where the claim arose; 4) convenience of the parties, given their physical and financial condition; 5) convenience of witnesses to the extent that they may be unavailable for trial; 6) location of books and records to the extent that they may not be able to be produced in the other forum; 7) enforceability of the judgment; 8) practical considerations that would make the trial more expeditious or less expensive; 9) local interest in deciding local controversies at home; 10) public policies of both forums; and 11) familiarity of the trial judge with the applicable law. See Jumara, 55 F.3d at 879-80 (3d Cir. 1995). A district court has broad discretion to decide "whether convenience and fairness considerations weigh in favor of transfer" under § 1404(a). Id. at 883; see also Plum Tree, Inc. v. Stockment, 488 F.2d 754, 756 (3d Cir. 1973).

A forum selection clause is a significant factor in the balancing process, but it is not dispositive. See Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29 (1988); Jumara, 55 F.3d at 880. A valid forum selection clause may be given more deference than

plaintiff's choice of forum, see Jumara, 55 F.3d at 880, but if the forum selection clause is unreasonable, it will not be considered a factor in transferring venue. See Plum Tree, 488 F.2d at 757.

Of the five agreements entered by Visual and MHC, the warrant and the restrictive covenants in the two employment agreements contain forum selection clauses. The forum selection clause in the warrant states that "the state and federal courts of New York shall have jurisdiction" to resolve disputes arising out of the warrant agreement. See Warrant § 9(e). The warrant agreement also states "[t]he exclusive choice of forum set forth in this Section 9(f)," id., but there is no section 9(f) in the warrant. It appears that this language was cut and pasted into the document; it may not have been bargained for by the plaintiffs. However, even if the warrant's forum selection clause were clear, it would require transfer to New York, not New Jersey.

The restrictive covenants of the two employment contracts state that New Jersey is the forum of choice. See Restrictive Covenants § 5.4. The forum selection clauses in the restrictive covenants claim to "confer jurisdiction" on federal and state courts in New Jersey, but also state that any determination of the federal and state courts in New Jersey would not bar the employer, MHC, from seeking redress in other courts. It is

difficult to understand why these provisions would not violate principles of res judicata.

The forum selection clauses in the warrant agreement and the restrictive covenants in the employment agreements do not control all of the agreements. If the forum selection clauses were enforced, the litigation could be divided. The forum selection clauses are unclear, confusing, and unreasonable; the forum selection clauses will not control.

In the absence of controlling forum selection clauses, the plaintiff's choice of forum is a paramount consideration and should only be disturbed when the balance of convenience is strongly in favor of the defendants. See Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970). Plaintiffs' choice of forum is the Eastern District of Pennsylvania, the plaintiffs' home forum. See American Littoral Soc. v. United States E.P.A., 943 F.Supp. 548, 550 (E.D. Pa. 1996) (plaintiff's choice of forum deserves less deference if it is not plaintiff's home forum). This factor weighs heavily against transfer of venue.

A plaintiff's choice of forum is to be given less weight when the operative facts that gave rise to the action occur in another forum. See National Mortgage Network, Inc. v. Home Equity Centers, Inc., 683 F.Supp. 116, 119 (E.D. Pa. 1988); Schmidt v. Leader Dogs for the Blind, Inc., 544 F.Supp. 42, 47 (E.D. Pa. 1982). Although the contracts at issue were signed in

New Jersey and are governed by New Jersey law, the performance (or nonperformance) of the contracts was intended to and occurred in Pennsylvania. Any counterclaims would probably arise from actions in Pennsylvania.<sup>1</sup> This factor weighs in favor of retaining venue in Pennsylvania.

The convenience of the parties is a consideration. The Brachmans are from Glen Mills, Pennsylvania, and the Irems are from Florham Park, New Jersey. There is no reason that either group is financially or physically unable to appear in either the Eastern District of Pennsylvania or the District of New Jersey. "Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient." Van Dusen v. Barrack, 376 U.S. 612, 645-46 (1964). This factor is not determinative.

The ability to subpoena relevant witnesses is another consideration. See Glen Knit Indus., Ltd. v. E. F. Timme & Son, Inc., 384 F.Supp. 1176, 1178 (E.D. Pa. 1974) (refusal to transfer from E.D. Pa. to S.D.N.Y. in part because witnesses in New York City were within 100 mile subpoena range). No witnesses

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<sup>1</sup>Defendants filed a separate action in the United States District Court for the District of New Jersey approximately one month after receiving plaintiffs' complaint. The claims in the New Jersey action deal with plaintiffs' alleged actions in Pennsylvania, including wiretapping. The pending case in New Jersey will be given no weight in the motion to transfer. See Stop-A-Flat Corp. v. Electra Start of Michigan, Inc., 507 F.Supp. 647, 652 (E.D. Pa. 1981)(A related action in another forum that was filed after the initial action is not persuasive).

unavailable in Pennsylvania have been named by the defendants. There is no reason to believe that any witnesses would be available in one forum but not the other. This factor does not weigh in favor of transferring venue.

Any relevant books and records are within the subpoena range of either the United States District Court for the Eastern District of Pennsylvania or the United States District Court for the District of New Jersey and could be produced in either court. Defendants have not provided any evidence of a document or record that is unavailable in Pennsylvania. This factor does not weigh in favor of transferring venue.

There is some Pennsylvania interest in determining the fate of the plaintiffs and the implications any decision might have on Visual's software business. There is also New Jersey interest in determining the defendants' fates and the implication that a decision might have on MHC. This factor does not weigh heavily in favor of one venue over the other.

The trial forum should have some familiarity with the law to be applied. See Van Dusen, 376 U.S. at 645. There are claims arising under both Pennsylvania and New Jersey law. Each agreement between the plaintiffs and defendants is governed by New Jersey law. There is also a claim under Pennsylvania's Wage Payment and Collection Law. The United States District Court for the Eastern District of Pennsylvania regularly applies New Jersey

law. This factor is not decisive for either venue.

Defendants' motion to transfer venue will be denied.



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MANAGED HEALTH CARE ASSOCIATES, INC.;	:	
LAWRENCE S. IRENE; AND	:	
ROBERT IRENE	:	No. 00-1401

ORDER

AND NOW, this 1st day of August, 2000, following a pre-trial conference pursuant to Fed. R. Civ. P. 16 on June 14, 2000, and upon consideration of defendants' motion to transfer, plaintiffs' response to the motion to transfer, and argument, and in accordance with the attached memorandum,

It is **ORDERED** that:

1. Defendants' motion to transfer Count II is **DENIED**.
2. All other provisions of the June 15, 2000 Order remain in effect.

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Norma L. Shapiro, S.J.